

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

UNITED STATES OF AMERICA ,) DOCKET NO. 5:08CR54-V
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) GOVERNMENT'S UNOPPOSED MOTION
vs.) TO WITHDRAW AND RE-FILE ITS
) MEMORANDUM OPPOSING
) CONSTITUTIONAL CHALLENGE AND
) MOTION TO CONTINUE HEARING

GREGORY ROLAND PRUESS

The United States of America, by and through Anne M. Tompkins, United States Attorney for the Western District of North Carolina, respectfully moves, without defense objection, to withdraw the Government's previously-filed Memorandum of Law Opposing Constitutional Challenge and to re-file its memorandum on or before July 22, 2011, resetting the defense response filing date to no sooner than August 5, 2011, and continuing the presently-scheduled hearing on the constitutional challenge from August 9, 2011, to the week of August 15, 2011, or in September 2011, and in support thereof states:

1. The Government filed its Memorandum of Law Opposing Constitutional Challenge on June 24, 2011. The memorandum was filed without review by the office's appellate division before undersigned counsel departed the country for a week-long training assignment and vacation.
2. Upon return to the office and after consultation with the appellate division, undersigned counsel learned that some of the Government's argument in its memorandum was premised erroneously on the unpublished *Chester* decision that was later withdrawn substituted with the Fourth Circuit's decision in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010).

3. The Government must re-file its memorandum to exclude reference to the withdrawn *Chester* decision and to focus more closely on the more-recent *Chester* decision referenced in the mandate issued in this case. Since this constitutional issue affects several cases pending in this district and elsewhere in the Fourth Circuit, undersigned counsel must submit the Government's memorandum for review by the office's appellate division.

4. Peter Adolph, Pruess' counsel, does not object to the Government re-filing its memorandum and requests at least two week for the filing of the defendant's response memorandum.

5. Additionally, the presently-scheduled hearing date of August 9, 2011, conflicts with undersigned counsel's scheduled attendance at Complex Online Crimes Seminar being presented at the National Advocacy Center (NAC) from August 9 through August 12, a course that is offered only one time each year. Undersigned counsel also is scheduled to participate in specialized moot court training for FBI experts in cellular telephone analysis from August 22 through August 26, 2011.

6. Based on these scheduling conflicts, the Government respectfully requests that the hearing on the constitutional challenge be reset to the week of August 15, 2011, or in September 2011. It should be noted that the Government does not intend to put on any testimonial evidence at the hearing, and that the hearing likely will involve only argument based on the legal memoranda filed by the parties. The estimated time for such a hearing is 60 to 90 minutes.

7. Peter Adolph, Pruess' counsel, does not object to continuing the presently-scheduled hearing. Defendant was released from prison on June 30, 2010, having served this term of imprisonment, and will not be prejudiced by the brief continuance.

For the reasons set forth above, the United States respectfully requests that this Honorable Court allow the Government to: 1) withdraw its previously-filed Memorandum of Law Opposing Constitutional Challenge, 2) strike the pleading from the record, 3) allow the Government to re-file its memorandum on or before July 22, 2011, 4) reset the date for the filing of a defense response date to on or after August 5, 2011, and 5) continue the presently-scheduled hearing on August 9, 2011, on the constitutional challenge to the week of August 15, 2011, or in September 2011.

RESPECTFULLY SUBMITTED, this the 14th day of July, 2011.

ANNE M. TOMPKINS
UNITED STATES ATTORNEY

s/ Thomas A. O'Malley
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CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Peter Adolph, Assistant Federal Defender, at Peter_Adolph@fd.org.

s/ Thomas A. O'Malley
THOMAS A. O'MALLEY
Assistant United States Attorney